

***United States Court of Appeals  
for the Second Circuit***



**RESPONDENT'S  
BRIEF**



*with affidavit*

# 75-4158

To be argued by  
MARY P. MAGUIRE

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## United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 75-4158

HERNAN RAUL HERRERA-LETELIER and  
ELBA G. MARTINEZ DE HERRERA,  
*Petitioners,*

—v.—

UNITED STATES IMMIGRATION AND  
NATURALIZATION SERVICE,  
*Respondent.*

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF  
IMMIGRATION APPEALS

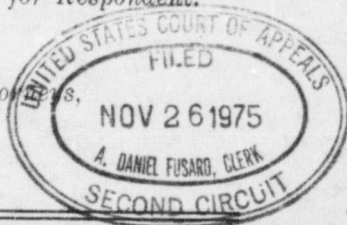
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### BRIEF FOR THE RESPONDENT

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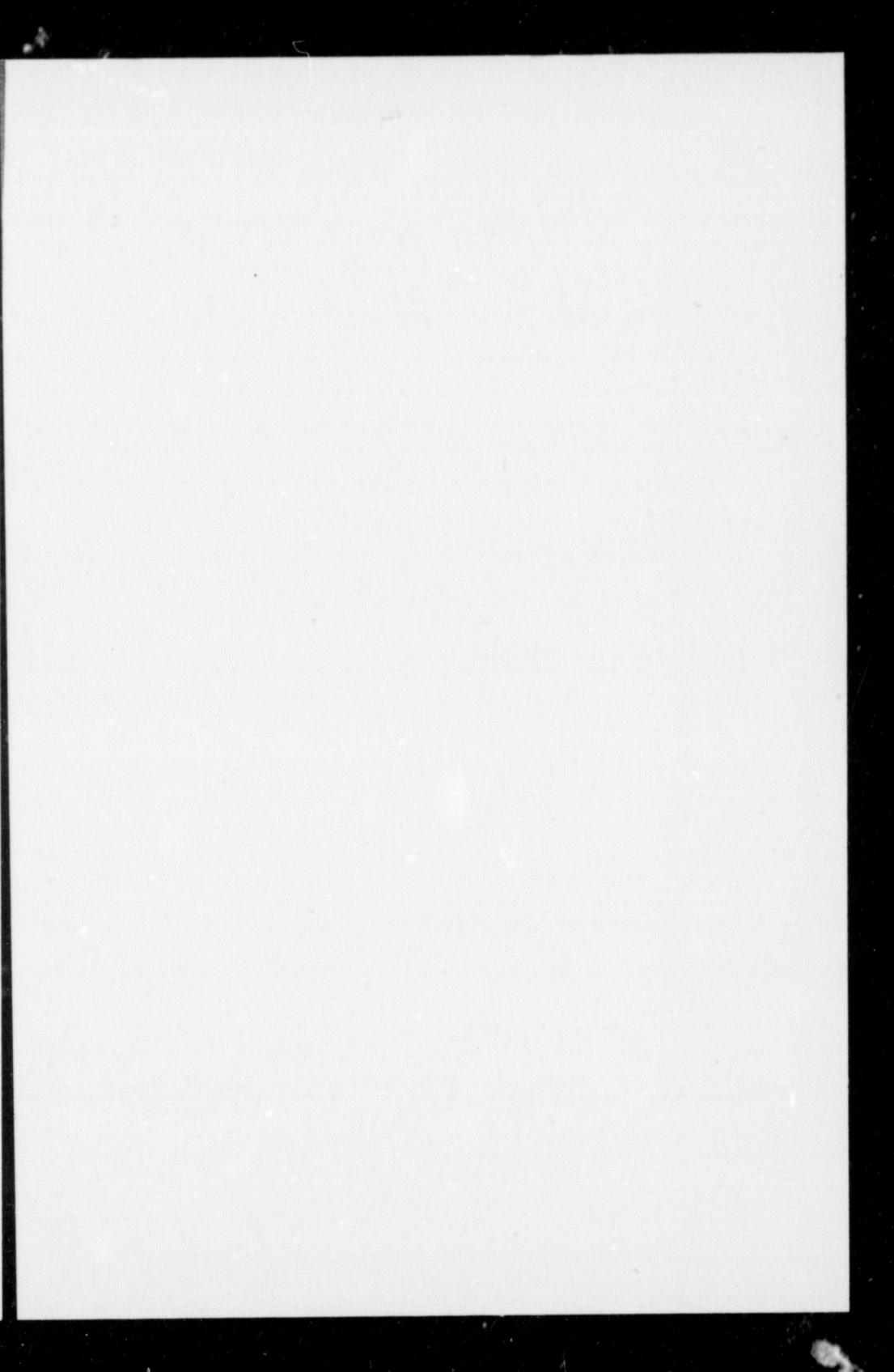
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ELBA G. MARTINEZ DE HERRERA,

*Petitioners,*

—v.—

UNITED STATES IMMIGRATION AND  
NATURALIZATION SERVICE,

*Respondent.*

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### BRIEF FOR THE RESPONDENT

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#### Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Hernan Raul Herrera-Letelier and Elba G. Martinez De Herrera (hereinafter the "petitioners") petition this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on February 3, 1975. That order dismissed the petitioners' appeal from an order of an Immigration Judge which found the petitioners deportable under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2), denied their applications for withholding of deportation under Section 243(h) of the Act, 8 U.S.C. § 1253(h), and granted them the privilege of voluntary departure. Petitioners contend that the Board's order should be reversed because the denial of their applications for withholding of deportation was arbitrary and capricious and an abuse of discretion.

### **Issues Presented**

Whether the denial by the Board of Immigration Appeals of petitioners' applications for withholding of deportation was arbitrary and capricious or an abuse of discretion.

### **Statement of Facts**

Petitioner Hernan Herrera-Letelier is a 42 year old alien, a native and citizen of Chile, who was admitted to the United States on June 5, 1970 as a non-immigrant visitor for pleasure and was authorized to remain in this country until August 1, 1970. The petitioner failed to depart at the expiration of his authorized stay and continued to illegally reside and work in the United States.

Petitioner Elba Martinez De Herrera is a 39 year old alien, a native and citizen of Chile. She was admitted to the United States on April 10, 1969 as a non-immigrant visitor for pleasure and was authorized to remain in this country until April 10, 1970. She failed to depart at the expiration of her authorized stay and, together with her husband, the male petitioner, and two alien children, continued to reside and work in the United States in violation of the Act.

On March 19, 1973 deportation proceedings were instituted against the petitioners by the issuance of orders to show cause and notices of hearing (T. 9 and 10). At a deportation hearing held on April 10, 1973 the petitioners conceded their deportability as overstay visitors (T. 8, p. 6) and applied for withholding of deportation pursuant to Section 243(h) of the Act on the ground that the petitioners would be subject to persecution in Chile on account of their political beliefs (T. 16 and 17).

By decision and order dated February 5, 1974 the Immigration Judge found the petitioners deportable as charged under Section 241(a)(2) of the Act, denied their applications for withholding of deportation and found that the petitioners had failed to sustain their burden of establishing that they would be subject to persecution if deported to Chile. The Immigration Judge granted petitioners the privilege of voluntary departure to March 7, 1974 and entered an alternate order of deportation to Chile in the event that the petitioners failed to voluntarily depart by the prescribed date (T. 7).

Petitioners appealed the decision of the Immigration Judge to the Board of Immigration Appeals and by an order and decision dated February 3, 1975 the Board dismissed the appeal. The Board found that the petitioners had failed to show a well-founded fear that their lives or freedom would be threatened in Chile on account of their race, religion, nationality, membership in a particular social group or political opinion (T. 4).

On March 6, 1975 warrants of deportation were issued since petitioners had failed to voluntarily depart from the United States by the prescribed date. By notice dated July 29, 1975 the petitioners were advised that the alternate orders of deportation would be enforced. However, on July 30, 1975 this petition for review was filed and petitioners' deportation stayed pursuant to Section 106(a)(2) of the Act, 8 U.S.C. § 1105a(a)(3).

### Relevant Statute

Immigration and Nationality Act, 66 Stat. 163 (1952),  
as amended:

Section 253, 8 U.S.C. § 1253—

\* \* \* \* \*

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

### Relevant Regulation

Title 8, Code of Federal Regulations (CFR)

Section 242.17. Temporary withholding of deportability. \* \* \* The respondent shall be advised that pursuant to Section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed. \* \* \*

## ARGUMENT

**The Attorney General did not abuse his discretionary authority in denying petitioners' applications for temporary withholding of deportation.**

### **A. General background.**

Section 243(h) of the Act, 8 U.S.C. § 1253(h), authorizes the Attorney General to withhold deportation when "in his opinion the alien would be subject to persecution on account of race, religion, or political opinion." Thus, the determination whether to withhold deportation rests wholly in the administrative judgment and opinion of the Attorney General or that of his duly authorized delegate.\* *Muscardin v. Immigration and Naturalization Service*, 415 F.2d 865 (2d Cir. 1969); *United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392 (2d Cir. 1953).

As an applicant for the statutory benefit, the burden is upon the alien to establish that he warrants the favorable exercise of discretion. 8 C.F.R. § 242.17(c); *Chen v. Foley*, 385 F.2d 929 (6th Cir. 1967), *cert. denied*, 393 U.S. 838 (1968). The statute requires a showing not only that the alien concerned is likely to be persecuted in the country of deportation, but that such persecution will be imposed for religious, racial or political reasons. Moreover, this Circuit has determined that only where there is a clear probability of persecution to the particular alien is this discretionary authority to be favorably exercised. *Cheng Kai Fu v. Immigration and Naturalization Service*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003

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\* The Attorney General has delegated his authority to the Immigration Judge, 8 C.F.R. 242.8(a), and to the Board of Immigration Appeals, 8 C.F.R. 3.1.

(1968). See also *Hyppolite v. Immigration and Naturalization Service*, 382 F.2d 98 (7th Cir. 1967); *Lena v. Immigration and Naturalization Service*, 379 F.2d 536 (7th Cir. 1967).

In examining the broad exercise of discretion as conferred upon the Attorney General's delegate, the scope of review in this Court is extremely narrow and limited to a determination of whether there has been an abuse of discretion. *Muscardin v. Immigration and Naturalization Service*, *supra*; *Zupicich v. Esperdy*, 319 F.2d 773 (2d Cir. 1963). Unless that determination is found to be without any rational explanation, to depart inexplicably from established practices or to rest on an impermissible basis, the Court should not substitute its judgment for that of the Attorney General. *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966); *Vardjan v. Esperdy*, 197 F. Supp. 931 (S.D. N.Y. 1961), *aff'd*, 303 F.2d 279 (2d Cir. 1962).

Accordingly, the issue before the Court is whether the Attorney General has abused his discretionary authority by denying the petitioners' applications for withholding of deportation. *Li Cheung v. Esperdy*, 377 F.2d 819 (2d Cir. 1967); *Kladis v. Immigration and Naturalization Service*, 343 F.2d 515 (7th Cir. 1965).

**B. The evidence before the Attorney General failed to establish a clear probability of political persecution.**

From the facts of this case it is evident that there has been no abuse of discretion. The Immigration Judge amply supported his decision in reason. The reasons relied upon by him were neither arbitrary nor capricious. The decision did not inexplicably depart from established

policies; nor did it rest on an impermissible basis such as an invidious discrimination against a particular race or group. The Immigration Judge followed the well-established rule that withholding of deportation is warranted only where there is a clear probability of persecution of the particular alien. *Fu v. Immigration and Naturalization Service*, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

Under 8 C.F.R. 242.17(c) the petitioner has the burden of establishing that he would be subject to persecution. *MacCaud v. Immigration and Naturalization Service*, supra. This the petitioners were unable to do. Their evidence, consisting solely of bare conclusory statements, without factual support which might demonstrate the reasonableness of their belief that they will be persecuted, is insufficient. *Khalil v. District Director*, 457 F.2d 1276 (9th Cir. 1972); *Gena v. Immigration and Naturalization Service*, 424 F.2d 227 (5th Cir. 1970).

Furthermore, it is submitted that the Board did not abuse its discretion in denying petitioners' request for additional time to investigate the activities of the military junta which succeeded the Allende government. Petitioners submitted their claim for withholding of deportation in April 1973. The Allende government in Chile fell the following September and a military junta assumed control of the Chilean government. Yet when the petitioners were accorded a hearing on their claim pursuant to Section 243(h) of the Act five months later they sought additional time to "investigate" the activities of the military junta.

In support of his application for withholding of deportation pursuant to Section 243(h), which was made in the spring of 1973, petitioners claimed that they would be subject to political persecution in Chile under the

Allende government. However, the hearing on the petitioners' application for withholding of deportation was not held until February 1974 at which time petitioners conceded that the Allende government had been ousted from power in the fall of 1973 and had been succeeded by a military junta. Petitioners' counsel requested additional time to "develop information concerning the present government" (T.8 p.13) despite the fact that approximately five months had elapsed between the fall of the Allende government and the hearing on petitioners' applications. The Immigration Judge denied the request of petitioners' counsel.

The basis of petitioners' claim appears to be the fact that the male petitioner had been a member of the Christian Democratic Party which is apparently no longer recognized by law in Chile. The male petitioner testified that his two brothers are residing in Chile as well as other relatives. His brothers are employed and one brother owns his own home. Apparently neither of his brothers had been denied employment or been arrested because of their political activity.

At the deportation hearing petitioners spoke in broad generalities about the situation in Chile. Although they may in fact be opposed to the present government and quite understandably prefer life in the United States, the statute demands a determination based upon the probability of persecution of the individual alien and not others. *Kovac v. Immigration and Naturalization Service*, 407 F.2d 102 (9th Cir. 1969). This is clear from the plain wording of the statute. In a case involving Chinese who applied for withholding of deportation, this Court stated:

"Their status in Hong Kong as exiles from the mainland of China will not distinguish them from thousands of others, and the physical hardship or economic difficulties they claim they will face will be shared by many others. Those difficulties do not amount to the kind of particularized prosecution that justifies a stay of deportation." *Fu v. Immigration and Naturalization Service, supra*, at 753.

The petitioners contend that in view of the oppressive climate which prevails in Chile, they would not be able to speak out against the government or would be subjected to punitive treatment if they did so. In *Matter of Surzycki*, 13 I. & N. Dec. 261 (1969), the Board of Immigration Appeals, which is the highest administrative appellate tribunal of the Immigration and Naturalization Service, held that:

"There is no indication that the Congress enacted Section 243(h) of the Act with a view of guaranteeing an alien freedom of speech in the country of his nativity, and if he is not afforded this by his government, then it could be considered that he was being persecuted. We do not interpret Section 243(h) as covering this situation. There are many totalitarian governments in the world today which do not brook dissent of any nature. We do not hold that an alien who feels compelled to espouse in his native country beliefs which are looked upon with disfavor by his government is thereby being persecuted if the government acts against him." *Id.* at 262.

It is submitted that the petitioners have not met the burden of proving that they would be singled out as individuals and persecuted upon their return to Chile and, accordingly, there was no abuse of discretion in denying them withholding of deportation on these grounds.

It is submitted that neither the Immigration Judge nor the Board acted arbitrarily or capriciously in denying the request for additional time. The hearing complied with all the requirements of a fair hearing. *Sung v. McGrath*, 339 U.S. 33 (1950). The petitioners were notified of the charges against them and of the time and place of the hearing. They were provided with the services of an interpreter and were represented by counsel. They were given the opportunity to be heard and to introduce evidence and witnesses on their behalf. 8 C.F.R. 242.16. The decision was governed by and based only on the evidence adduced at the hearing.

### CONCLUSION

**The petition for review should be dismissed.**

Respectfully submitted,

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AFFIDAVIT OF MAILING

CA 75-4158

State of New York     )  
County of New York    )

Pauline P. Troia,                   being duly sworn,  
deposes and says that she is employed in the Office of the  
United States Attorney for the Southern District of New York.

That on the 26th day of  
November 1975 she served <sup>2 copies</sup> ~~copy~~ of the within  
Government's brief

by placing the same in a properly postpaid franked envelope  
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Stewart J. Stowell, Esqs.,  
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Boston, Mass. 02116

And deponent further says  
s he sealed the said envelope and placed the same in the  
mail chute drop for mailing in the United States Courthouse Annex,  
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Pauline P. Troia

Sworn to before me this

26th day of November 19 75

Ralph I. Lee